

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICHARD GLENN BENNETT

Claimant

VS.

FRANCIS CONSTRUCTION, INC.

Respondent

AND

CONTINENTAL WESTERN INS. CO.

Insurance Carrier

Docket No. **1,021,609**

ORDER

Respondent and its insurance carrier request review of the August 19, 2010 Post-Award Medical Award by Administrative Law Judge Rebecca A. Sanders. This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument. The Division's Acting Director appointed E.L. Lee Kinch of Wichita, Kansas, to serve as Board Member Pro Tem in place of Carol Foreman, who retired in September 2010.

APPEARANCES

Gary Laughlin of Topeka, Kansas, appeared for the claimant. Douglas Johnson of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the post award record and adopted the stipulations listed in the Award.

ISSUES

This is an appeal from an award entered after a hearing on an application for post-award medical treatment. As a result of a work-related low back injury the claimant had a laminectomy at L5-S1 on September 3, 2004. He settled his workers compensation claim on December 27, 2005, with the right to future medical treatment left open. On July 24, 2009, claimant filed an application for post-award medical treatment for his low back.

Following a post-award hearing, the Administrative Law Judge (ALJ) determined that claimant's current symptoms were a direct and probable consequence of claimant's June 1, 2004 injury. Consequently, the ALJ authorized additional medical treatment for claimant with Dr. Shawn Moore and injections with Dr. Ian Kucera. The ALJ also ordered respondent to pay certain medical expenses¹ as authorized medical in accordance with the Kansas Fee Schedule.

Respondent requests review of whether claimant's current low back condition is causally related to his June 1, 2004 accidental injury. Respondent argues that claimant has failed to sustain his burden of proof that his current low back condition is related to his original work-related injury.

Claimant argues that the evidence establishes that there are post-operative changes at L5-S1 which is the same location as his original work-related injury and therefore the ALJ's Post-Award Medical Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

As previously noted, claimant suffered a low back injury on June 1, 2004, while working for respondent. Surgery was performed on September 3, 2004, by Dr. Ebeling, wherein claimant underwent a laminectomy at L5-S1. This claim was resolved at a settlement hearing on December 27, 2005, but the right to seek future medical was left open.

The claimant testified that after his surgery he had back discomfort for awhile but after he went through physical therapy his back gradually improved and was doing well until approximately July 2009. Although claimant had not returned to work for respondent he was self-employed doing construction work and in approximately 2007 became employed in facilities management for Stormont-Vail where his duties include painting, hanging pictures, drywall work, ceiling work, and patching holes.

In the years after his back surgery, claimant would experience intermittent back pain but did not take pain medication on a regular basis. In 2006 the claimant sought treatment for acute back pain after bending over. In July 2009 claimant again sought treatment with pain in his back and right leg. Claimant described the July incident in the following manner:

¹ P.A.H. Trans., Ex. 6.

Q. Describe for us, if you would, how you've gotten along with your low back since the date of that settlement hearing back in December of 2005. And try to do it in chronological order, if you could.

A. Well, since -- after the surgery, there was discomfort and stuff for a while and I went to the physical therapy and then it gradually got better and it was doing -- I thought was doing rather well here up until about a year ago.

Q. And what happened about a year ago?

A. I just started getting the low back pain. I was -- I was -- one day I was just bent over, just cutting a two-by-four, just a piece of wood. And I stood up and I just -- you know, I just -- ahh, you know, and had the pain back down the back of my leg and my butt again. And at that particular time, if I do believe, I went and seen a nurse there and I -- I did get a few days off from work to ice and heat, ice and heat. And it was persistent after that. And that's when I contacted you and said, "Gary, is there something that we can do about this?"

Q. All right. Did your low back pain and problems that you first started experiencing again about a year ago cause you to seek professional help and treatment?

A. Yes, it did.²

Claimant testified that the cutting wood incident happened with his current employer but he didn't notify them of the injury. And claimant further noted that he was pleased with his quality of life until the incident in July 2009.

On July 24, 2009, claimant's attorney filed an application for post-award medical requesting treatment for his low back. The respondent referred claimant for examination and evaluation by Dr. Paul Stein. Dr. Stein examined claimant on September 10, 2009, and noted:

Without more diagnostic information, I cannot determine the extent to which the current symptomatology is related to the previous injury. If there is substantial scar tissue at the surgical area or if there is evidence of recurrent disk herniation there would be a causal relationship. If different pathology is present, there may not be a causal relationship. X-rays of the lumbar spine with flexion-extension and a lumbar MRI scan with and without contrast enhancement are required before a more definitive opinion can be given.³

The diagnostic studies that Dr. Stein recommended were performed. In a follow-up report, Dr. Stein noted that the x-rays showed mild diffuse degenerative changes which

² *Id.* at 7-8.

³ *Id.*, Cl. Ex. 3 at 5.

were worse at the thoracolumbar junction. The MRI demonstrated postoperative changes at L5-S1 with desiccation in most of the lumbar disks. There was decreased fatty tissues around the left L5 nerve root with epidural fibrosis on the left at L5-S1. But there was no evidence of residual or recurrent disk herniation. Dr. Stein explained the findings in a letter dated November 2, 2009. The doctor wrote:

DISCUSSION: I spoke with attorney Douglas Johnson on the telephone today. The epidural fibrosis on the left at L5-S1 noted in my report of 10/9709 [sic] was not excessive and was typical of a postoperative situation. While it may contribute to some degree to the patient's left leg discomfort, it is not the excessive type of scar tissue referred to as "substantial scar tissue" in my report of 9/10/09. It is not likely responsible for his current back pain.⁴

Dr. Stein told claimant that there was no further treatment he would recommend other than over the counter pain medication. In February 2010, claimant sought treatment on his own with Dr. Shawn Moore, a neurosurgeon. Dr. Moore reviewed the MRI with claimant and told him that he suspected claimant was symptomatic from his L5-S1 degenerative disk disease. Dr. Moore recommended a series of epidural injections and referred claimant to Dr. Kucera. Claimant has received two and testified that he has gotten some relief from the pain and he wants to receive the third injection.

A second application for post-award medical was filed on June 11, 2010, and the post-award medical hearing was held on August 12, 2010.

In a request for post-award medical treatment, the claimant has the burden to prove his right to an award of compensation and prove the various conditions on which his right depends.⁵ In a post-award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve and cure the natural and probable consequences of the original accidental injury which was the subject of the underlying award.⁶ The controlling issue is whether claimant's present need for medical treatment for his low back complaints is directly and naturally related to the June 1, 2004 accident.

In summation, the evidence indicates that although claimant experienced intermittent back pain he never received any significant medical treatment for his back for several years. And then in July 2009, he bent over to cut a two by four at work for his current employer and when he straightened up he experienced back pain radiating into his leg. And the pain was significant enough that he immediately sought medical treatment. Respondent referred

⁴ *Id.*, Cl. Ex. 5.

⁵ K.S.A. 44-501(a).

⁶ K.S.A. 2004 Supp. 44-510k(a).

claimant to Dr. Stein who determined that if additional diagnostic studies revealed substantial scar tissue at the surgical area or if there was evidence of recurrent disk herniation there would be a causal relationship between claimant's current symptomatology and the previous injury. But after reviewing the additional diagnostic studies Dr. Stein noted that there was no sign of recurrent disk herniation and the epidural fibrosis revealed on the MRI was not substantial scar tissue. And it was not likely responsible for claimant's current back pain. Finally, Dr. Moore's report indicates he suspected claimant was symptomatic due to his degenerative disk disease.

Claimant has the burden of proof to establish that his medical condition is a direct and probable consequence of the original work-related injury. The record presented at the post-award hearing is deficient in this regard. There is no expert medical opinion that claimant's present low back condition and need for treatment is a direct and natural consequence of the work-related injury established in the underlying Award. Consequently, the ALJ's Post Award Medical Award is reversed and claimant is denied additional treatment for his low back condition.

AWARD

WHEREFORE, it is the decision of the Board that the Post-Award Medical Award of Administrative Law Judge Rebecca A. Sanders dated August 19, 2010, is reversed to reflect claimant has failed to meet his burden of proof that he requires additional medical treatment for the injuries suffered September 3, 2004, while working for respondent. Claimant's request for additional medical treatment is denied.

IT IS SO ORDERED.

Dated this _____ day of March, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary Laughlin, Attorney for Claimant
Douglas Johnson, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge